Supreme Court, U.S.
FILED
MAY 21 1998
OF THE CLERK

No. 97-1514

In the Supreme Court of the United States

OCTOBER TERM, 1997

INNER CITY PRESS/COMMUNITY ON THE MOVE, ET AL.,
PETITIONERS

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES V. MATTINGLY, JR.
General Counsel

RICHARD M. ASHTON
Associate General Counsel

KATHERINE H. WHEATLEY
Assistant General Counsel

YVONNE F. MIZUSAWA
Senior Attorney
Board of Governors of the
Federal Reserve System
Washington, D.C. 20551

QUESTION PRESENTED

Whether the court of appeals correctly dismissed the petition for review of an order of the Board of Governors of the Federal Reserve System for lack of Article III standing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Fair Employment Council v. *BMC Marketing Corp.*, 28 F.3d 1268 (D.C. Cir. 1994)	5
Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982)	4, 5
Hunt v. *Washington Apple Adver. Comm'n.*, 432 U.S. 333 (1977)	5
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	6
Schlesinger v. *Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)	7
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976)	4
Spann v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir.), cert. denied, 498 U.S. 980 (1990)	5
Steel Co. v. *Citizens for a Better Env't*, 118 S. Ct. 1003 (1998)	4, 7
Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982)	7
Warth v. *Seldin*, 422 U.S. 490 (1975)	4, 5, 7

Constitution and statute:

U.S. Const. Art. III	2, 3, 4, 5, 6, 7
Community Reinvestment Act of 1977, 12 U.S.C. 2901 *et seq.*	2
§ 804(a), 12 U.S.C. 2903(a)	6

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1514

INNER CITY PRESS/COMMUNITY ON THE MOVE, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 130 F.3d 1088. The order of the Board of Governors of the Federal Reserve System (Board) approving the notice by Banc One Corporation (Banc One) to merge with First USA, Inc. (First USA) (Pet. App. 4a-20a) is reported at 83 Fed. Res. Bull. 602.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1997. The petition for a writ of certiorari was filed on March 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In early 1997, Banc One filed a notice with the Board for approval to merge with First USA. After a request for comments on the notice was published in the *Federal Register*, the Board received comments from a number of parties including petitioners Inner City Press/Community on the Move (ICP), the Delaware Community Reinvestment Action Council (DCRAC), and Black Citizens for Justice, Law & Order (BCJLO).

Petitioners claimed, among other things, that Banc One's record of meeting community credit needs in accordance with the Community Reinvestment Act of 1977 (CRA), 12 U.S.C. 2901 *et seq.*, should weigh against approval. In evaluating Banc One's proposal, the Board considered petitioners' comments, Banc One's responses, and the CRA performance record of Banc One, its subsidiaries, and First USA. The Board concluded that the relevant factors, including the organizations' CRA performance, were consistent with approval and issued an order approving the acquisition. Pet. App. 4a-20a.

Petitioners filed a petition for review of the Board's order and a motion for an emergency stay with the court of appeals. The court of appeals granted Banc One's unopposed motion for leave to intervene and denied petitioners' motion for a stay. The court directed the parties to address the issue of standing in any future filings. Pet. 6.

The Board and Banc One later moved to dismiss the petition for review for lack of Article III standing. The court of appeals, in a per curiam opinion, dismissed the petition. Pet. App. 1a-3a. Noting that petitioners' participation in the proceedings before the

Board does not, without more, satisfy the Article III requirement of injury in fact, the court held that petitioners lack Article III standing. *Id.* at 2a-3a.

ARGUMENT

The court of appeals correctly rejected petitioners' claim of Article III standing to challenge the Board's determination that Banc One's acquisition of First USA was consistent with the CRA. Nothing in the opinion of the court of appeals warrants this Court's review. The decision of the court of appeals is not in conflict with any decision of another court of appeals or of this Court. Nor does the opinion of the court of appeals implicate an important or unsettled question of law.

1. Petitioners claim (Pet. 8-10) that the court of appeals erred by "fail[ing] to consider whether petitioners had established organizational standing." Nothing in the court's opinion suggests, however, that it failed to consider whether the petitioner organizations had standing on their own behalf. Petitioners, the Board, and Banc One all briefed the issue of organizational standing before the court of appeals. The court had the benefit of those briefs when it issued its ruling. The court held that, "[w]hile petitioners may have satisfied prudential standing by virtue of their participation in administrative proceedings, * * * they have not demonstrated Article III standing." Pet. App. 3a. It is therefore evident that the court considered the issue of organizational standing in dismissing the petition.

2. In any event, petitioners' allegations are insufficient to establish organizational standing. This Court recently reiterated that, as an "irreducible constitutional minimum," to establish standing under

Article III, a party must demonstrate that: (i) it has suffered an "injury in fact" that is "concrete and actual or imminent, not conjectural or hypothetical"; (ii) there is "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct"; and (iii) there is "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co.* v. *Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-1017 (1998) (internal quotation marks and citations omitted). An organizational plaintiff may have standing to sue on its own behalf, *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975), but the organization must meet the same Article III requirements as an individual plaintiff, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 378 (1982).

Petitioners first argue (Pet. 10) that "the Board has frustrated the organizational purposes of petitioners." That allegation, however, does not constitute an injury in fact under Article III. To establish an injury in fact, an organization must show "concrete and demonstrable injury to [its] * * * activities—with [a] consequent drain on [its] resources—constitut[ing] far more than simply a setback to [its] * * * abstract social interests." *Havens Realty*, 455 U.S. at 379. Petitioners' "abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art[icle] III." *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976).

Petitioners also claim (Pet. 10) that, because of the Board's order, they "must expend greater efforts, energy, and resources to obtain mortgages, consumer credit, and other banking services for their members." That allegation, too, is insufficient to establish

injury in fact, because it is unsupported by "specific, concrete facts." See *Warth*, 422 U.S. at 508.

Although petitioners' affidavits[1] contain statements that they must "expend more time and resources counseling and assisting those in need of credit" because of the Board's order, see, *e.g.*, Lee Aff. ¶ 7, they provide no specific facts to support that conclusion. For example, petitioners have not even shown that they experienced an influx of individuals seeking counseling as a result of the Board's order, see *Fair Employment Council* v. *BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994); that the Board's order stymied their efforts to provide individuals with access to credit, see *Havens Realty*, 455 U.S. at 379; that the order decreased the resources available for counseling and other programs, see *Hunt* v. *Washington Apple Adver. Comm'n.*, 432 U.S. 333, 345 (1977); or that the order required them to "devote scarce resources" to "counteract" its deleterious effects, see *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24, 28 (D.C. Cir.), cert. denied, 498 U.S. 980 (1990). In the absence of details of that type, petitioners' allegations lack the concreteness and particularity required by Article III.[2]

---

[1] To support their standing, petitioners rely on affidavits by three members of their organizations. See Affidavit of Matthew R. Lee, sworn to September 10, 1997 (Lee Aff.); Affidavit of Nickie Christopher Chance, sworn to September 9, 1997 (Chance Aff.); Affidavit of Rashmi Rangan, sworn to September 9, 1997 (Rangan Aff.).

[2] Likewise, petitioners' assertions that, "[i]f the [Board] is not required to take into consideration * * * the CRA records of Banc One and its subsidiaries," petitioners "will be compelled to spend even greater resources to assist [their] members" and "will not be able to maintain all of [their] current programm[illegible]

Even assuming petitioners have alleged cognizable injuries, they have failed to demonstrate causation and redressability. Causation and redressability are particularly difficult to demonstrate when, as in this case, the petitioners' "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

Although petitioners allege that they spent time and resources counseling individuals in need of credit, they do not allege that the counseling was necessitated by the Board's order. See, *e.g.*, Lee Aff. ¶ 8; Chance Aff. ¶ 10; Rangan Aff. ¶¶ 11, 13. Only affiant Lee even mentions Banc One, alleging that "in 1995, ICP provided fair lending and fair housing counseling to individuals and associations in Louisiana, who were concerned about, and injured by, Premier Bancorp., Inc. * * * , which Banc One then partially controlled." Lee Aff. ¶ 5. That counseling took place two years before the Board's order in this case, so there cannot be a causal connection between the order and the counseling.

Petitioners have also failed to show that their alleged injuries would be redressed by reversal of the Board's order. Reversal of the order would not reimburse petitioners for any of their expenditures. And, given the very general nature of the CRA's mandate, see 12 U.S.C. 2903(a), it is pure speculation that reversal of the order would result in heightened CRA efforts on the part of Banc One that would benefit petitioners. Because "[n]one of the specific items of

---

efforts," Chance Aff. ¶ 12; Lee Aff. ¶ 13, are "pure speculation" and do not meet the requirements of Article III. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 567 (1992).

relief sought * * * would serve to reimburse [petitioners] for [their] losses," petitioners have failed to demonstrate standing under Article III. See *Steel Co.*, 118 S. Ct. at 1018.

3. Finally, petitioners cannot circumvent the requirements of Article III by their claim (Pet. 7-8) that, if organizations such as they do not have standing to challenge Board orders, "a citizen's right to benefits under the CRA" will be "emasculate[d]." The absence of alternative plaintiffs cannot cure a plaintiff's lack of standing. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974). Further, the Court "repeatedly has rejected claims of standing predicated on 'the right, possessed by every citizen, to require that the Government be administered according to law.'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-483 (1982) (internal citations omitted). In the absence of personal, particularized harm, petitioners have no standing to enforce the "right to benefits under the CRA" on behalf of the community at large. See *Warth*, 422 U.S. at 502 ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES V. MATTINGLY, JR.
General Counsel

RICHARD M. ASHTON
Associate General Counsel

KATHERINE H. WHEATLEY
Assistant General Counsel

YVONNE F. MIZUSAWA
Senior Attorney
Board of Governors of the
Federal Reserve System

MAY 1998